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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

QUINTON M. DURAN,

Defendant and Appellant.

B210523

(Los Angeles County
Super. Ct. No. LA058561)

APPEAL from a judgment of the Superior Court of Los Angeles County. Martin Herscovitz, Judge. Affirmed.

Oscar B. Valencia for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, and Tasha G. Timbadia, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Quinton Duran (“Duran”) appeals his convictions for possession, possession for sale, and transportation of a controlled substance (Health and Saf. Code, §§ 11350, subd. (a), 11351, 11352, subd. (a),) and giving false information to a police officer (Pen. Code, § 148.9, subd. (a)). Duran’s sole contention on appeal is that the trial court violated his constitutional right to counsel by denying his motion to substitute a privately retained attorney for his appointed counsel. We conclude that the trial court did not abuse its discretion in denying the motion as untimely, and affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Factual Background

On March 11, 2008, narcotics officers from the Los Angeles Police Department conducted a search of Duran’s apartment. Duran was alone in the apartment when the officers arrived, and was detained in the living room during the search. He told one officer that his name was Antonio Solis Charondo. During the search, officers found 5.12 grams of heroin in the kitchen and 2.37 grams of cocaine in the hallway closet. They also recovered \$12,000 in cash, three scales, and two cell phones which were continuously ringing. One of the scales contained a brown substance resembling heroin residue. Officers then conducted a search of Duran’s car which was parked outside. Hidden inside a stereo on the rear passenger seat was 1.23 grams of heroin. At trial, one of the officers who participated in the search opined that Duran possessed the narcotics found in the apartment for the purpose of sale.

Following his arrest, Duran was released on bail on March 13, 2008. On March 27, 2008, narcotics officers were conducting surveillance of Duran’s apartment. Officer Ramiro Capa observed Duran leave the apartment and drive away in a four-door Lexus. Other officers then initiated a traffic stop of Duran’s car. While being detained, Duran told Officer Capa that his name was Antonio Solis. During a search of the car, officers recovered 0.35 grams of cocaine and 0.15 grams of heroin from a stereo on the rear passenger seat. They also found \$1,100 in cash in Duran’s wallet. Duran was arrested and transported to the police station. At the station, Duran told Officer Capa that

he used to sell cocaine and heroin, but that it had been two weeks since he sold any drugs and that the drugs in the car were for his personal use. At trial, Officer Capa opined that Duran possessed the narcotics found in the car for the purpose of sale.

II. Procedural History

In an amended Information, the Los Angeles County District Attorney charged Duran with two counts of transportation of a controlled substance (Health and Saf. Code, § 11352, subd. (a)), three counts of possession of a controlled substance for sale (Health and Saf. Code, § 11351), and two counts of giving false information to a police officer (Pen. Code, § 148.9, subd. (a)). The Information alleged that, at the time of the March 27, 2008 offenses, Duran had been released from custody on bail or his own recognizance within the meaning of Penal Code section 12022.1. It further alleged that Duran had suffered one prior serious or violent felony conviction pursuant to the “Three Strikes” law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and one prior felony conviction pursuant to Health and Safety Code section 11370.2, subdivision (a). In response to the trial court’s inquiry at the preliminary hearing, Duran stated on the record that his true full name was Quinton Duran Martinez.

On August 12, 2008, the day that trial was set to begin, Duran’s court-appointed counsel, Jonathan Petrak (“Petrak”), informed the trial court that Duran wished to be represented by a privately retained attorney, Alan Saralou (“Saralou”). Saralou was present in court at the time of the request and confirmed that he had been retained by Duran’s family. The court asked Saralou whether he was ready to start trial that day and Saralou responded that he was not. He noted that when he met with Duran’s family the previous night, he “had no clue this was eight of ten.” Saralou stated that he would require a continuance of 30 days to review discovery and get ready for trial. The prosecution opposed a continuance on timeliness grounds, and the trial court expressed similar concerns, explaining that the witnesses were under subpoena and a jury panel had been reserved for a trial that day.

The trial court inquired whether Duran had previously made a *Marsden* motion, and was informed that he had not. (See *People v. Marsden* (1970) 2 Cal.3d 118.) Petrak

stated that it was his understanding that Duran simply wanted an attorney he had hired and did not have a personal problem with appointed counsel. The court indicated, however, that it would hear “a *Marsden* motion now” to discuss with Duran what dissatisfaction, if any, he had with his appointed attorney. The court advised Petrak, “[I]f it’s just a personal preference, let me find that out. If there’s some problem with your representation, then let me find that out.” The courtroom was cleared for a *Marsden* hearing.

During the closed hearing, the trial court asked Duran whether his request for substitution of counsel was based on a personal preference between attorneys, or was the result of a problem with appointed counsel’s representation. Duran responded that he had a “little” problem with the representation provided by Petrak. Duran complained that Petrak had not contacted all of his proposed witnesses, had not brought a motion to dismiss Duran’s prior felony strike, and had not provided Duran with paperwork regarding his case so that he could make an informed decision about a plea bargain. In response, Petrak stated that he had sent an investigator to speak to Duran’s witnesses and had found them to be unhelpful with “very little to say.” Petrak also explained that he did not file a pre-trial motion to dismiss Duran’s prior strike because it was his experience that a court would only entertain such a motion after trial absent compelling circumstances, which he did not find in Duran’s case. Petrak further indicated that, although he initially agreed to provide Duran with some of the paperwork in the case, he became concerned about a potential problem with jailhouse informants and believed that it was dangerous for Duran to have his case file while in custody. Petrak asserted that he was withholding the paperwork for Duran’s own protection and would provide him with the complete file at the conclusion of the case.

After considering Duran’s concerns and Petrak’s responses, the trial court concluded that there had “not been a break down in the relationship.” The court noted that the differences between counsel and client were relatively minor and would not prevent Petrak from continuing to provide Duran with adequate representation. The court

stated that it was denying Duran's motion to relieve his appointed counsel "for purposes of any conflict of interest."

Once the *Marsden* hearing was concluded, the trial court resumed the proceedings in open court. The court asked the attorneys whether they had anything further to say about the request to substitute counsel, and both Petrak and Saralou responded that they did not. The court then explained that there was "an extreme timeliness problem" with Duran's request because trial was set to begin that day. The court reiterated that the witnesses were under subpoena and the jury panel was reserved, and noted that any issues relating to the adequacy of appointed counsel's representation were "minuscule to nonexistent." Based on these factors, the court concluded that "[t]he request for substitution of counsel on the day set for trial, not only on the day set for trial, but literally, on the hour set for trial, that would result in a continuance of at least 30 days, is unreasonable and would cause significant disruption to the fair administration . . . of justice in this case." The court therefore denied Duran's motion to substitute counsel and his accompanying request for a continuance.

At the conclusion of the trial, the jury found Duran guilty of all charges, except for one count of possession of a controlled substance for sale arising out of the March 27, 2008 arrest. With respect to that charge, the jury instead found Duran guilty of the lesser included offense of possession of a controlled substance in violation of Health and Safety Code section 11350, subdivision (a). Following a bifurcated bench trial on Duran's alleged prior convictions, the trial court sentenced Duran to an aggregate term of 13 years and 8 months in state prison. On August 29, 2008, Duran filed a timely notice of appeal.

DISCUSSION

On appeal, Duran challenges the trial court's denial of his request to substitute a privately retained attorney for appointed counsel. He contends that he was entitled to counsel of his own choosing without having to make a *Marsden* showing, and that the trial court's erroneous treatment of his request as a *Marsden* motion resulted in the violation of his constitutional right to counsel. The Attorney General counters that

regardless of how the trial court initially framed the issue, it ultimately considered the appropriate factors in its ruling and properly concluded that Duran’s last-minute motion was untimely. We agree that the trial court acted within its discretion in denying Duran’s request for substitution of counsel on the ground that it was untimely, and thus, would cause a significant disruption to the judicial process.

A criminal defendant is entitled to assistance of counsel at all critical stages of the proceedings. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) “The right to the effective assistance of counsel ‘encompasses the right to retain counsel of one’s own choosing. [Citations.]’ [Citation.] Underlying this right is the premise that ‘chosen representation is the preferred representation. Defendant’s confidence in his lawyer is vital to his defense. His right to decide for himself who best can conduct the case must be respected wherever feasible.’ [Citation.]” (*People v. Courts* (1985) 37 Cal.3d 784, 789.)

“Any limitations on the right to counsel of one’s choosing are carefully circumscribed.” (*People v. Courts, supra*, 37 Cal.3d. at p. 790.) Our Supreme Court accordingly has held that the right to retained counsel “‘can constitutionally be forced to yield *only* when it will result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.’ [Citations.] The right to such counsel ‘must be carefully weighed against other values of substantial importance, such as that seeking to ensure orderly and expeditious judicial administration, with a view toward an accommodation reasonable under the facts of the particular case.’ [Citation.]” (*Ibid.*)

Limitations on the right to continuances when linked to an assertion of the right to retained counsel are similarly circumscribed. (*People v. Courts, supra*, 37 Cal.3d. at p. 790.) Generally, the trial court has discretion whether to grant a continuance to permit a defendant to be represented by a privately retained attorney. (*Ibid*; *People v. Jeffers* (1987) 188 Cal.App.3d 840, 850.) “A continuance may be denied if the accused is ‘unjustifiably dilatory’ in obtaining counsel, or ‘if he arbitrarily chooses to substitute counsel at the time of trial.’ [Citation.]” (*People v. Courts, supra*, at pp. 790-791.) “In

deciding whether the denial of a continuance was so arbitrary as to violate due process, the reviewing court looks to the circumstances of each case, “particularly in the reasons presented to the trial judge at the time the request [was] denied.” [Citations.]” (*Id.* at p. 791.) “Where a continuance is requested on the day of trial, the lateness of the request may be a significant factor justifying denial absent compelling circumstances to the contrary. [Citation.]” (*People v. Jeffers, supra*, at p. 850.)

The right to effective assistance of counsel also encompasses the right to a court-appointed attorney in cases where a criminal defendant is unable to employ counsel of his or her own choosing. (*Gideon v. Wainwright* (1963) 372 U.S. 335; *People v. Marsden, supra*, 2 Cal.3d at p. 123.) The trial court has an absolute duty to appoint counsel to represent an indigent defendant. (*People v. Marsden, supra*, at p. 123.) However, “[a] defendant’s right to a court-appointed counsel does not include the right to require the court to appoint more than one counsel, except in a situation where the record clearly shows that the first appointed counsel is not adequately representing the accused. . . .” [Citations.]” (*Ibid.*) A defendant must show good cause in seeking the substitution of one appointed attorney for another because appointment of more than one counsel wastes public resources by creating “duplicative representation and repetitive investigation at taxpayer expense,” and may also allow defendants to “delay trials and otherwise embarrass effective prosecution’ of crime. [Citation.]” (*People v. Ortiz* (1990) 51 Cal.3d 975, 986.) When a defendant requests the substitution of one appointed counsel for another, *Marsden* mandates a court hearing to determine whether the first appointed counsel is rendering constitutionally inadequate representation. (*People v. Marsden, supra*, at pp. 123-124.) “[T]he trial court must permit the defendant to explain the basis of his [or her] contention and to relate specific instances of the attorney’s inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations].” (*People v. Crandell* (1988) 46 Cal.3d 833, 854.)

In contrast to cases involving appointed counsel, a criminal defendant generally has the right to discharge retained counsel with or without cause. (*People v. Ortiz, supra*, 51 Cal.3d at p. 983.) While an indigent defendant must demonstrate inadequate representation or an irreconcilable conflict of interest to obtain newly appointed counsel, a non-indigent defendant seeking to discharge retained counsel is not required to satisfy the requirements of *Marsden*. (*Id.* at p. 984.) The right to discharge retained counsel, however, is not absolute. The trial court has the discretion to deny a request to discharge retained counsel “if discharge will result in ‘significant prejudice’ to the defendant [citation] or if it is not timely, i.e., if it will result in ‘disruption of the orderly processes of justice’ [citations.]” (*Id.* at p. 983.) A trial court faced with a request to substitute retained counsel “must balance the defendant’s interest in new counsel against the disruption, if any, flowing from the substitution. [Citations.]” (*People v. Lara* (2001) 86 Cal.App.4th 139, 153.) As a general matter, a motion for substitution of counsel may be denied as untimely if made on the day of trial. (See, e.g., *People v. Keshishian* (2008) 162 Cal.App.4th 425, 429; *People v. Turner* (1992) 7 Cal.App.4th 913, 919; *People v. Lau* (1986) 177 Cal.App.3d 473, 479.)

We agree with Duran that his request to substitute appointed counsel with retained counsel was not subject to the specific requirements of *Marsden*. As the Supreme Court noted in *People v. Courts*, *Marsden* concerns “the substitution of *appointed* counsel for another *appointed* counsel,” and “[t]he standards for evaluating such requests are quite different than those used in the retained counsel context.” (*People v. Courts, supra*, 37 Cal.3d. at p. 795, fn. 9.) The more stringent *Marsden* requirements, which are triggered when a defendant requests a different appointed counsel, are directed at preventing a waste of public resources through duplicative representation at the taxpayers’ expense. (*People v. Ortiz, supra*, 51 Cal.3d at p. 986.) Such concerns are not present, however, when a defendant wishes to replace appointed counsel with a privately retained attorney. Instead, the relevant considerations in ruling on a motion to substitute appointed counsel with retained counsel are the potential prejudice to the defendant and whether the timing

of the request will negatively impact the orderly administration of justice. (*People v. Courts, supra*, at p. 790.)

Because Duran was seeking to replace appointed counsel with retained counsel rather than another appointed attorney, he was not required to prove that his appointed counsel was rendering inadequate representation or that he was involved in an irreconcilable conflict of interest with his attorney. A *Marsden* hearing was therefore not the appropriate vehicle for addressing Duran's motion for substitution of counsel. However, the fact that the trial court held a *Marsden* hearing prior to ruling on the motion did not result in any prejudice to Duran because, after the *Marsden* hearing was held, the trial court considered the appropriate factors in adjudicating Duran's request, and then properly denied his motion for substitution of counsel as untimely.

During the open court proceedings, the trial court carefully balanced Duran's right to counsel of his own choosing against the judicial obligation to ensure an orderly and expeditious administration of justice. (*People v. Courts, supra*, 37 Cal.3d. at p. 790.) The court explained on the record that there was "an extreme timeliness problem" with Duran's request to substitute counsel. The request came on the day set for trial right before jury selection was to begin. A panel of at least 40 prospective jurors had been reserved, and the witnesses had been subpoenaed to appear. When the trial court inquired about newly retained counsel's readiness for trial, it was informed that counsel was not ready to proceed and would require a continuance of at least 30 days. Counsel also noted that he had "no clue" that the case was "eight of ten" when he had met with Duran's family the previous night about a possible substitution. Contrary to Duran's contention, there is nothing in the record to support that he acted diligently to retain a private attorney in sufficient time for the scheduled trial date. (*People v. Blake* (1980) 105 Cal.App.3d 619, 623-624 ["[A] defendant who desires to retain his own counsel is required to act with diligence and may not demand a continuance if he is unjustifiably dilatory or if he arbitrarily desires to substitute counsel at the time of the trial. [Citations.]"].)

Under these circumstances, the trial court justifiably was concerned about the untimeliness of Duran's request to substitute counsel and the inability of retained counsel

to immediately step in without delaying the trial. Given that Duran waited until the day of trial to make his motion and would have required a 30-day continuance if it were granted, the trial court did not abuse its discretion in determining that the request was untimely. (See *People v. Keshishian*, *supra*, 162 Cal.App.4th at p. 429 [The trial court properly “reject[ed] appellant’s last-minute attempt to discharge counsel and delay the start of trial” where the request for substitution of counsel was made on the day set for trial.]; *People v. Turner*, *supra*, 7 Cal.App.4th at p. 919, fns. omitted [“Here defendant sought to replace his attorney on the day of trial. This meant that the request could not be granted without causing a significant disruption, i.e., a continuance with the attendant further inconvenience to witnesses and other participants.”]; *People v. Lau*, *supra*, 177 Cal.App.3d at p. 479 [The motion for substitution of counsel “was made literally the moment jury selection was to begin. As evidenced by the court’s comments . . . the timeliness, or lack thereof, of the request properly concerned the court.”].)

In ruling on Duran’s request for substitution of counsel, the trial court also properly considered whether the denial of the request on untimeliness grounds would cause significant prejudice to Duran by forcing him to proceed to trial without adequate representation. The trial court was not obligated to hold a *Marsden* hearing to address Duran’s motion to replace appointed counsel with retained counsel, nor was Duran required to demonstrate inadequate representation or an irreconcilable conflict of interest under *Marsden*. However, the nature of Duran’s complaints about his appointed counsel and the trial court’s finding that such complaints did not reflect a breakdown in the attorney-client relationship were relevant to determining whether there was a compelling reason to justify the request for substitution of counsel despite its lack of timeliness. (See *People v. Keshishian*, *supra* 162 Cal.App.4th at p. 429 [trial court applied correct standard in denying request for substitution of counsel where “[a]ppellant asked for and was given an opportunity to address the court concerning his desire to discharge counsel and his reasons for doing so”]; *People v. Turner*, *supra*, 7 Cal.App.4th at p. 919 [where defendant sought to replace retained counsel on day of trial, “question then became whether such a disruption was reasonable under the circumstances”]; *People v. Lau*,

supra, 177 Cal.App.3d at p. 479 [trial court “did not rely solely on the untimeliness of [appellant’s] request” in denying the substitution of counsel, but also “considered [appellant’s] remarks regarding his disagreement with counsel”].)

Here, rather than reject Duran’s untimely request out of hand, the trial court allowed Duran to address the court directly about his desire to replace his appointed attorney and his reasons for doing so. Based on Duran’s reported concerns, his dissatisfaction with appointed counsel’s representation related primarily to trial tactics and did not reflect an irreconcilable conflict of interest. While Duran and his attorney had a difference of opinion as to whether Duran should be provided with a copy of counsel’s case file, their disagreement was not severe in nature. Nor was there any suggestion that appointed counsel was rendering inadequate representation to Duran or was not fully prepared to proceed with trial that day. Apart from his personal preference for a privately retained attorney, Duran did not offer any other reason for seeking a last-minute substitution of counsel and accompanying continuance. Based on the record before it, the trial court was well within its discretion in deciding that Duran’s dissatisfaction with his appointed attorney did not justify the disruption to the judicial process that would result from an untimely substitution.

In sum, we are satisfied that, in adjudicating Duran’s request to substitute retained counsel for appointed counsel, the trial court considered the appropriate factors. In reaching its decision, the court properly weighed the competing interests implicated by Duran’s request for a privately retained attorney and concluded that his request was untimely and would cause a significant disruption to the orderly administration of justice. The trial court’s denial of Duran’s motion to substitute counsel on the day of trial was not an abuse of discretion.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.